

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

MOTION HEARING

BEFORE THE HONORABLE RODNEY GILSTRAP  
UNITED STATES CHIEF DISTRICT JUDGE

SHAWN McROBERTS, RMR, CRR  
100 E. HOUSTON STREET  
MARSHALL, TEXAS 75670  
(903) 923-8546  
wn\_mcroberts@txed.uscourts.gov

## A P P E A R A N C E S

FOR THE PLAINTIFFS: STEPTOE, LLP  
1330 CONNECTICUT AVE, NW  
WASHINGTON, DC 20036  
(202) 429-6749  
BY: MR. MICHAEL ALLAN  
MR. JOHN CARACAPPA

STEPTOE, LLP  
227 WEST MONROE, SUITE 4700  
CHICAGO, ILLINOIS 60603  
(312) 577-1283  
BY: MR. JOHN BYRON

THE DAVIS FIRM, PC - LONGVIEW  
213 NORTH FREDONIA STREET  
SUITE 230  
LONGVIEW, TEXAS 75601  
(903) 230-9090  
BY: MR. BO DAVIS  
MR. RUDY FINK

FOR THE DEFENDANTS: WINSTON & STRAWN/CHICAGO  
200 PARK AVENUE  
NEW YORK, NEW YORK 10166  
(212) 294-6729  
BY: MR. MICHAEL ELKIN  
MR. KRISHNAN PADMANABHAN  
MR. SEAN ANDERSON

WARD, SMITH & HILL, PLLC  
1507 BILL OWENS PARKWAY  
LONGVIEW, TEXAS 75604  
(903) 757-6400  
BY: MS. CLAIRE HENRY

OFFICIAL REPORTER: SHAWN M. McROBERTS, RMR, CRR  
100 E. HOUSTON STREET  
MARSHALL, TEXAS 75670  
(903) 923-8546

1 THE COURT: Be seated, please.

2 All right. This is the time set for various motion  
3 practice before the Court in the matter of BMG, et al., versus  
4 Altice, et al., Case No. 2:22-CV-471.

5 Let me ask for announcements on the record at this time.

## 6 | What says the Plaintiffs?

7 MR. FINK: Good afternoon, Your Honor. Rudy Fink  
8 for the Plaintiffs. I'm joined by Mr. John Byron, lead  
9 counsel Mr. Mike Allan, Bo Davis, and Mr. John Caracappa.  
10 And we are ready to proceed.

11 THE COURT: Thank you.

12 What's the announcement for the Defendants?

13 MS. HENRY: Good afternoon, Your Honor. Claire  
14 Henry for the Defendants. I'm joined today by Michael Elkin,  
15 Krishnan Padmanabhan, and Sean Anderson. And we're ready to  
16 proceed, Your Honor.

23 Have you discussed how we're going to present that? I  
24 don't care who presents it as long as the other side agrees  
25 with it, but we need to get it clear in the record.

1 MR. FINK: Your Honor, Rudy Fink. I'll speak.

2 We have not directly talked about this with Altice, so  
3 I'll let them correct me if I'm wrong.

4 We have worked together to create two joint agreed orders  
5 for the Court. My understanding is the agreed order in  
6 regards to the motions that Altice has brought are now finally  
7 agreed. There's about one or two turns left on Plaintiffs'  
8 motions that put all of that -- basically there's just a final  
9 set of edits that we have not had time to check. But overall  
10 we prepared agreed orders for the Court's consideration.

11 THE COURT: All right, sir. So, in other words,  
12 you're both satisfied that you know what you've agreed to, and  
13 you're going to document that in the record shortly but you  
14 haven't done it at this point.

15 MR. FINK: Correct, Your Honor.

16           Absolutely for Altice's motions. There's potentially --  
17           there's a final set of revisions to be exchanged towards  
18           Plaintiffs' motions.

19 THE COURT: All right. And does that comport with  
20 Defendants' understanding of where you are? Obviously my  
21 point is I don't want to understand now that something's been  
22 worked out and find out later it has not been worked out.

23 MS. HENRY: Understood, Your Honor. I think we have  
24 a couple of edits with regard to timing that are sort of the  
25 hold-up right now, a timing when things will be produced. And

1 so we're about to send them the most recent draft that will  
2 have our most recent edits. I'm confident we can work through  
3 this and -- but I don't want to hold up the hearing, but we'll  
4 proceed in whatever way the Your Honor would like to.

5 THE COURT: All right. Well, I'm going to direct  
6 the parties to continue their efforts to memorialize those  
7 agreed matters that were otherwise set for today and to file  
8 that memorialization on the docket as soon as it's completed,  
9 and also to furnish a courtesy copy to chambers.

10 And in the meantime, we'll take up what appears to be at  
11 an impasse. And I'll trust that we don't have to double back  
12 on the agreed matters at a later date, but if that happens  
13 that happens.

14 MS. HENRY: Thank you, Your Honor.

15 THE COURT: All right. Then with that, let's turn  
16 to the matters you've identified for the Court as effectively  
17 you're at an impasse on, and let's particularly focus on the  
18 Plaintiffs' motion to compel material withheld on improper and  
19 unsupported assertions of privilege. That is Document  
20 No. 134.

21 And let me hear from the moving Plaintiffs on this first.

22 MR. BYRON: Your Honor, I have a slide deck that I'd  
23 like to use as a demonstrative through the argument here. Do  
24 you mind if I approach the bench?

25 THE COURT: That will be fine.

1           Let me say this. We apparently are going to have  
2 different people arguing different things, so let's everybody  
3 start with identifying who you are for the record, and then  
4 we'll proceed.

5           MR. BYRON: Yes, Your Honor. This is John Byron  
6 with the Steptoe firm for the Plaintiffs.

7           THE COURT: All right. Let me hear your argument.

8           MR. BYRON: You know, Your Honor, I'm always  
9 reluctant to bring a motion to compel on privilege issues,  
10 but really here the motion was important because Altice has  
11 attempted to hold back from discovery some of the most  
12 important material in the case. I want to jump into the slide  
13 deck to show you why.

14           So Altice in this case is -- it's staring at a potential  
15 judgment of hundreds of millions of dollars for allowing  
16 repeat infringers to run rampant on its network. Their entire  
17 defense rests on that it took reasonable steps to address  
18 copyright infringement and terminate service of repeat  
19 infringers.

20           To establish the safe harbor that you see on the slide 2,  
21 they're going to have to tell the jury that they reasonably  
22 implemented a policy providing termination of repeat  
23 infringers in appropriate circumstances. That's going to be  
24 difficult in this case, Your Honor. The discovery has shown  
25 there's significant blemishes in that defense.

1       Altice not only had just one policy, it had four  
2 inconsistent ones. The only thing that was consistent about  
3 those policies was their limitations. Altice adopted business  
4 rules, including grace periods and notice processing caps,  
5 that allowed it to ignore millions of infringement notices.  
6 It had long periods of time where no infringement notices were  
7 processed, including one period that went more than one year  
8 without processing.

9       If you turn to slide 3, you see Altice's evidentiary  
10 plan. The first thing they're going to do is they're going to  
11 argue to the jury that they have an appropriate policy for  
12 terminating repeat infringers. When doing that, they're going  
13 to try to justify their limitations in the policies, including  
14 the grace periods, the notice processing caps, the numbers of  
15 levels in the DMCA process, and other things. And they're  
16 also going to defend the number of policies and the times that  
17 that policy changed over and over.

18       Then they're going to go to reasonable implementation.  
19 They're going to try to explain away long periods of time that  
20 there were notice processing gaps, one of which lasted over a  
21 year. Another which lasted approximately six months. They're  
22 also going to try to excuse deviations from the policy that  
23 happened repeatedly throughout the discovery period.

24           THE COURT: Well, rather than wander down the path  
25 of what you expect they're going to try to do, why don't you

1 tell me about the documents and materials that haven't been  
2 produced and why you think they should be compelled.

3 MR. BYRON: Yes, Your Honor.

4 And I think the background I was just giving is very  
5 helpful to understand at least the business issue and also the  
6 safe harbor issue.

7 And I'm just going to need to get a glass of water real  
8 quick, Your Honor.

9 I'm sorry, Your Honor. My voice was cracking there.

10 THE COURT: That's all right.

11 MR. BYRON: Okay. So there are three categories of  
12 documents. You'll see on slide 4 where Altice is making  
13 fundamentally unfounded privilege assertions. Right? So  
14 there is an improper privilege claim that includes documents  
15 where they're withholding business and operational materials,  
16 and also includes kind of your typical type materials that you  
17 see parties debate in these privilege disputes; so non-lawyer  
18 documents, third party documents, and other non-confidential  
19 communications.

20 The second issue that we're dealing with is actually the  
21 first issue in the motion, which is a sword/shield issue. So  
22 the reason I was going through the background, albeit with a  
23 voice that was a little bit dry, we see in the background that  
24 they're going to have this whole case about explaining why  
25 they did things that resulted in ignoring millions and

1 millions of copyright infringement notices. That's going to  
2 include these justifications about the limitations, it's going  
3 to include explanations about long periods of time where they  
4 weren't processing notices.

5 And why is that important? Because they're offering  
6 those reasons to you at summary judgment and they'll offer  
7 those reasons to the jury at trial, but what we're seeing in  
8 the documents is we're seeing that the Altice folks are  
9 withholding the full picture. Right? So we'll see some of it  
10 in interrogatory responses or in corporate representative  
11 testimony, but when we go to the contemporaneous record, we're  
12 running into, Oh, it's privileged.

13 The last issue in the motion is Altice's unsupported  
14 privilege claims. Altice -- we identified in the motion  
15 several problems with Altice's privilege log. Altice agreed  
16 to produce a new privilege log, but they have not yet done  
17 that. So we're sitting here more than a month after the  
18 motion was filed, we're sitting here more than three months  
19 after we raised this issue, and we still don't have an updated  
20 privilege log.

21 On top of that, the Court has a pretty-established  
22 process for these privilege motions. Right? So when a  
23 privilege issue is raised, the party who is asserting the  
24 privilege needs to meet its burden, and they ordinarily do  
25 that through affidavit or declaration, and we haven't seen

1 that in this case.

2 So let's go into some examples to make this a little bit  
3 more concrete. So if you go to slide 5 in the slide deck,  
4 you're going to see the -- a summary of some of the improper  
5 privilege claims that Altice is making in this case. I'm  
6 going to use the screen here to show you some documents and  
7 show you why they're problematic.

8 So the motion had an exhibit, it had a chart in the back  
9 of it, it was Exhibit 1, and there were two categories in the  
10 chart. There were the business and operational documents and  
11 then there were the documents that were sort of the other  
12 issues that I described. And the business and operational  
13 documents --

14 And if you want to just pull up in the Exhibit 1 here.

15 So you see it -- the business and operational documents  
16 have various sort of buckets or categories. So this was the  
17 state of affairs when we filed the motion. The state of  
18 affairs has somewhat changed. So Altice has made productions  
19 of certain documents. They made a production when they filed  
20 their opposition, then they made a production on April 5th,  
21 and they made another production last night at 7:30. So we  
22 have some of this stuff, but there are still categories that  
23 we know are still active. Right? There are still categories  
24 where we are at an impasse as to the privilege on certain  
25 documents.

1           The first category I want to go to --

2           If you can go to the next folder. So it's the DMCA  
3 policy review, and I'll go to tab 1.

4           So I'm going to explain to you this project. So in 2018,  
5 late 2018 and early 2019, the Altice company did a study of  
6 their policies. Right? So at that time they had two policies  
7 in place. And what happened is that the COO of the company, a  
8 gentleman by the name of Hakim Boubazine.

9           Could you go to tab 1, please?

10          Okay. So this is the -- this tab is a setup -- and Your  
11 Honor, I'm sorry. I had a document binder, but we had a bit  
12 of a snafu with it, so I'm doing this with the computer. It  
13 would be preferable with the binder. But this is what we  
14 have.

15          So here we have the setup for this first example. So  
16 this is late 2018, early 2019. There's two policies in place  
17 at Altice at the time, one for Optimum and one for Suddenlink.  
18 The COO comes in and says, We need to look at this. Right?  
19 His name was Hakim Boubazine. So he orders a policy review.  
20 Right? Give me the information about the Suddenlink policy  
21 and give me the information about the Optimum policy.

22          The team that he directed to do that was the customer  
23 experience team, a group of business folks. The customer  
24 experience team puts together a comprehensive presentation,  
25 makes the presentation to Mr. Boubazine on the 3rd of January

1 and 2019, and then Mr. Boubazine makes some comments.

2 So if we go to tab 2 in this section, you'll see that the  
3 presentation here is attached to an email that a person by the  
4 name of Lisa Farrell sends, who is in the customer experience  
5 team, and what she's saying, Here is the final deck from that  
6 presentation we gave to Mr. Boubazine. And low and behold,  
7 what do we find when we go to the attachment? We find a  
8 privilege block.

9 And if we go to tab 3--and I'm just going to move  
10 quicker--if we go to tab 3, we see not only have they redacted  
11 the presentation or just completely withheld it; they've also  
12 redacted the notes or the comments from Mr. Boubazine after  
13 the presentation.

14 When we go into the record, we don't see any evidence  
15 that a lawyer drafted the presentation. We know it was the  
16 customer experience team. We don't see any evidence that a  
17 lawyer participated in the drafting of that presentation. We  
18 don't see any evidence that the lawyer presented at this  
19 meeting. There's no evidence to give any indication that this  
20 is attorney/client material.

21 And this is extremely important stuff. Not only are we  
22 dealing with a review of the policies they're going to rely on  
23 at summary judgment and at trial; we're dealing with the  
24 development of a new policy, but we're also likely dealing  
25 with some bad stuff.

1           So if you could go to tab 4 in the binder, please.

2           This is a document in tab 4 that we just got on April  
3 5th. This is after discovery. And you'll see in this  
4 document Mr. Boubazine the COO, who ostensibly takes the reins  
5 of the DMCA process, he's being very critical of the policies  
6 that are in place at the Altice company.

7           So if you go down to the second page, you'll see an  
8 exchange between Prakash Pillai and Mr. Boubazine. About the  
9 third email up Mr. Boubazine says, "I was explicit in stating  
10 that I didn't want to implement the Optimum policy," and the  
11 reason was because he believed that the -- after a review,  
12 that the Optimum policy was obscure, not validated, and,  
13 therefore, definitely not the model to be implemented.

14           So we see stuff like this--right?--now after discovery,  
15 but we have stuff still in this motion that are things that  
16 kind of appear just like this--right?--but are being withheld,  
17 and we don't see any basis for that happening.

18           So if we go back to the slide deck, we have these reviews  
19 or these sort of reviews of the existing policies, but we also  
20 have as another issue a big problem with these enforcement  
21 gaps. So I mentioned there were long periods of time where  
22 the company wasn't actually applying its policy at all.

23           The first example I want to go through is in the middle  
24 of page 5 on the slide deck.

25           And if we can go to tab 1 in the enforcement gap section.

1       And I'll give a little background here. So in 2019, in  
2 September of 2019, there was a migration or combination of the  
3 systems, and what happened when that occurred was that there  
4 was something that happened with the systems that made it so  
5 that Suddenlink notices for Suddenlink customers, these  
6 copyright infringement notices, weren't processed all the way  
7 from September of 2019 to January of 2021. So we're talking  
8 about over a year.

9       And then on top of that, we had another issue but on the  
10 other side of the house where the Optimum folks had their  
11 notice system go offline from July of 2020 all the way till  
12 January or February of 2021.

13       So what happens after that? Mr. Boubazine, the guy  
14 who's kind of a taking the reins of this project, this is the  
15 guy that we had a big fight over we get these documents,  
16 whether it's relevant, et cetera--it's clear it's relevant--he  
17 comes in and says, you know, What the heck happened. Right?  
18 And he orders a sort of a review of what happened.

19       So we see in tab 1 here -- that's some background  
20 information about this review.

21       If you scroll down.

22       So he -- this is kind of the questions he is asking.

23       And then if you go to tab 2, what do we see? So we see  
24 three gentlemen who aren't lawyers. We have a gentleman who's  
25 in the customer experience team, we have a gentleman in the

1 product team, and we have a gentleman in the HSD security  
2 team, and they're putting together the answers to these  
3 questions, the talking points. Right?

4 So if you scroll down, you'll see when did this process  
5 stop? In 2020. And why. Right? This is the big 'why'  
6 problem. Here we have the 'why' and perhaps the 'when'  
7 redacted. Right? And there's no good reason for it because  
8 there's no lawyers on this. This was a review led by -- or  
9 ordered by the COO Mr. Boubazine. This is a process that's  
10 being sort of spearheaded by three non-lawyers, and,  
11 nonetheless, we see a redaction.

12 Now, this is kind of where the issue of business  
13 documents overlaps or intersects with the first issue the,  
14 safe harbor issue. What we see, Your Honor, is that Altice  
15 wants to offer its preferred explanation of what happened  
16 here. Right? So we ask an interrogatory, What were the times  
17 that the systems weren't working and what was happening, like  
18 why. And they give their narrative. It's Interrogatory 19.  
19 I think it's one of the tabs here in the folder -- in the  
20 enforcement gap folder, tab 3. And they give a narrative  
21 explaining it away. Right? And so what they're trying to do  
22 is make it look as innocent as possible. Right? Presumably  
23 in an attempt to avoid a willfulness finding. So they give  
24 all their preferred explanations about it.

25 But what we don't see -- this is, of course a lawyer-

1       driven interrogatory process. What we don't see, what we were  
2       just looking at, is we don't see all the material that would  
3       let us test the veracity of the statements here. Right?  
4       Because we're getting them redacted.

5           THE COURT: Counsel, two things. Let's see if we  
6       can't move onto the second and third categories.

7           MR. BYRON: Sure.

8           THE COURT: And just as a matter of personal  
9       preference, you seem to pepper your argument with rhetorical  
10      'rights' throughout, like you're asking me a question. And  
11      every time you say 'right', I think, Is he wanting me to  
12      respond to his statement or not. I understand it's  
13      rhetorical, but it would help me follow your argument better  
14      if you'd leave those out of it.

15           MR. BYRON: Understood, Your Honor.

16           THE COURT: I think I have a grasp of what's at  
17      issue with the first category of the asserted privilege, but  
18      I'd like you to turn also, for the interest of time, if we  
19      could go to the sword/shield, and the third what you're  
20      calling 'unsupported categories'.

21           MR. BYRON: Okay. And there are other examples.  
22      Like I said, I have a whole binder full of stuff.

23           THE COURT: We don't have the time.

24           MR. BYRON: I completely understand.

25           THE COURT: And we need to talk one at a time for

1 the record, so if I'm talking you should stop and --

2 MR. BYRON: Yes, Your Honor.

3 THE COURT: -- if you're talking I try not to  
4 interject.

5 MR. BYRON: Okay.

6 THE COURT: Okay?

7 MR. BYRON: So the sword/shield issue, we were just  
8 starting to see the sword/shield issue in the documents that  
9 we were looking at. So this is an issue where -- it's a  
10 pretty well-established principle you can't use privilege in  
11 order to shield information if you're going to assert stuff  
12 that implicates the privilege. Right? And, you know, the  
13 cases talk about it in different ways. Your typical  
14 circumstance where you see this arise is the lawyer opinion  
15 that's put at issue and then, you know, everything around the  
16 lawyer opinion will go in because of the sword/shield issue.

17 But the courts also say that if you make an assertion of  
18 fact and the assertion of fact can only be tested or  
19 understood through the assessment of privileged information,  
20 then the -- that's a sword/shield issue, and the information  
21 that's behind that assertion of the fact, privileged or not,  
22 is something that needs to be produced.

23 We sort of liken this case to the cases in the sexual  
24 harassment context with the Faragher-Ellerth defense, if  
25 you're familiar with those cases, Your Honor. The defense

1       essentially says if you're an employer and there is sexual  
2       harassment that's happening at your facility, what you need to  
3       do is you need to take reasonable steps to address it, and  
4       then you can avoid vicarious light. Right? So --

5           Excuse me, Your Honor.

6           So the safe harbor here operates almost identical to  
7       that. We have a situation where there is a vicarious  
8       liability claim in the case, the safe harbor defenses -- we  
9       took reasonable steps to address copyright infringement, and  
10      Altice is making assertions of fact about why it believed  
11      those steps were reasonable steps.

12       So you see some of those background principles on slide 8  
13      of the slide deck, but if you go to slide 9 of the slide deck,  
14      you'll see those background principles applied in more  
15      concrete ways.

16       So on the left side we have the sword issue. Right?  
17      This is what Altice is saying in interrogatory responses, in  
18      corporate representative testimony, they're giving  
19      justifications for notice processing limitations, notice  
20      format restrictions, inapplicability of the process, the  
21      business customers' grace periods, process length, et cetera,  
22      but they're withholding material that clearly bears on each of  
23      those issues under an assertion of privilege. It doesn't --  
24      when you do that, we get a circumstance where the company is  
25      allowed to come and say, We did the grace periods for X and Y

1 reasons, but there may be a Z reason, and we're not allowed to  
2 see the Z reason because they're asserting a privilege over  
3 it. So that's a quintessential assertion of fact where  
4 they're using the fact as a sword and using the privilege as  
5 the shield.

6 Another is these explanations of processing gaps and  
7 limitations where we have the innocuous responses and Altice  
8 is responding to interrogatories or questions at deposition  
9 and giving their preferred explanation, but we're seeing in  
10 contemporaneous documents the redacted material, which is  
11 another sort of sword/shield problem.

12 So that's the biggest sort of sword/shield issue. And, I  
13 mean, it really is a big issue in this case, Your Honor,  
14 because what's going to happen is that Altice is going to have  
15 one of their in-house lawyers sponsor their narrative at trial  
16 for the safe harbor. The gentleman who served as their  
17 corporate representative was one of their in-house lawyers.  
18 He was the corporate representative on many, many topics,  
19 including the policies and how they operated and terminations,  
20 et cetera; he's the person that's here saying the why, he said  
21 also, I was the one that developed a lot of these systems, but  
22 some of the material around that Altice is holding back from  
23 us. And that's a big problem because we have a lawyer who's  
24 going to sponsor a story to the jury and we're not allowed to  
25 fully test it.

1       Now let's go to the third issue. So the third issue is  
2 on page 10. The third issue is about the failure of Altice to  
3 support the privilege claim. It's fundamental that if you're  
4 going to assert the privilege, you have the burden to support  
5 it. The privilege, of course, is meant to be interpreted  
6 narrowly. It is especially meant to be interpreted narrowly  
7 in the context of an in-house lawyer, the company arrangement,  
8 because in-house lawyers as is common in most organizations,  
9 they wear several different hats. Right? They wear the  
10 business hat, they wear the legal hat, and they wear all sorts  
11 of different hats as well. So it's really important in these  
12 kinds of cases where you're dealing with assertions of  
13 privilege involving in-house counsel to come and support the  
14 privilege.

15       Altice's initial logs didn't do that. There was really  
16 no way to tell from Altice's initial logs why something was  
17 privileged. We can look at, for example --

18       If you would pull up in the first folder, tab 2. We can  
19 look at the third page of this, so if you'll go to page 3.

20       And you see log entry 18 --

21       Go one more down. You're on page 2.

22       You see log entry 1879 there. This is the presentation  
23 that we saw in the DMCA policy review. This was the  
24 presentation that was prepared by customer experience and  
25 delivered to the COO of the company. And what this says is

1 this is a document providing information to obtain the legal  
2 advice of in-house counsel regarding policies and procedures  
3 for addressing notices of alleged copyright infringement.

4 Well, that doesn't jibe with what we saw in the document, but  
5 it also doesn't really, you know, let us -- even if it  
6 did--right?--it doesn't really let us assess the privilege in  
7 a meaningful way because we don't know who the in-house  
8 counsel, was we don't know when, you know, the advice was  
9 asked for, delivered, et cetera.

10 So there are many different types of examples. I don't  
11 want to take up the Court's time with all the examples, but  
12 there are many different types of examples in the privilege  
13 log that we pointed out in the motion as to why the claim is  
14 unsupported.

15 I think Altice realized that their privilege log had some  
16 problems with it. They had promised to supplement their  
17 privilege log like they did promise a re-review of documents  
18 because I think they also realized there was a problem with  
19 the withholdings, and that was promised to us now over a month  
20 ago and it's something we still don't have. So we're sitting  
21 at a hearing on the motion to compel and, frankly, I don't  
22 -- I couldn't tell you right now what the full scope of the  
23 problem is because I don't know what has been produced and not  
24 produced. I don't know what they're saying the reason is for  
25 not producing stuff.

1       And I think that's a big problem, especially because this  
2 Court has a well-established process for the privilege. The  
3 motion to compel is filed. This is in the Court's discovery  
4 order. And 14 days later when the party asserting the  
5 privilege is meeting the privilege in their opposition they're  
6 meant to provide facts and not just lawyer argument. And  
7 that's why there's a declaration and affidavit process, and  
8 that didn't happen here.

9       So all of these are pretty big problems, Your Honor.  
10      There are many different categories of what we would consider  
11      fundamentally important documents that are being withheld and  
12      we're -- from every angle, whether it be business or  
13      operational, whether it be sword/shield, or whether it be  
14      unsupported privilege assertions, from every angle those are  
15      documents that should be produced.

16       THE COURT: All right. Thank you, counsel.

17       Let me hear from Defendants on this in response.

18       MR. ANDERSON: Good afternoon, Your Honor. Sean  
19      Anderson on behalf of Defendants. Thank you.

20       THE COURT: Good afternoon.

21       Please proceed.

22       MR. ANDERSON: Thank you.

23       So a lot of what Plaintiffs' counsel just recited with  
24      respect to the facts of the case are incorrect and warrant  
25      correction and clarification in terms of the underlying merits

1 of this dispute, but in light of the timing this afternoon and  
2 addressing the issues at hand, I'm going to focus on the three  
3 issues as opposing counsel set them forth.

4 As a preliminary matter, in this case Altice has reviewed  
5 over 200,000 substantive emails from 17-plus custodians,  
6 including Mr. William Heberer who is Altice's lead lawyer in  
7 charge of not only issues related to copyright infringement  
8 but other issues, and has a dual role on litigation and  
9 business side as well.

10 Altice has produced tens of thousands of documents  
11 relating to the development, implementation, and essentially  
12 execution of its policies for addressing copyright  
13 infringement. Many thousands of those emails include in-house  
14 counsel William Heberer and others.

15 Altice is not withholding documents that are purely  
16 business and operational. Plaintiffs have in their  
17 possession--and I'm not exaggerating; I know I've used some  
18 large numbers several times--thousands of documents relating  
19 to what the company did with respect to its policies; why it  
20 did what it did with respect to its policies; if questions  
21 were coming in from operational people, people in sales,  
22 people in -- on the IT side, they have the answers to those  
23 questions; they have the notes from the weekly and bi-weekly  
24 meetings in which the folks who were responsible for operating  
25 these things talked about issues that may arise, the reason

1 why one thing is happening. Frankly, they even have emails in  
2 which our in-house counsel is asking questions about what the  
3 policy is and how it should be implemented. They have those.  
4 They have these in the form of, as I said, emails, PowerPoint  
5 presentations, and policy reviews, similar to what Mr. Byron  
6 was describing. They've had these documents and they've been  
7 logged since, pursuant to the Court's docket control order,  
8 November the 1st. That's when our first log was served.

9 When Plaintiffs raised the concern in their present  
10 motion with respect to the documents that Mr. Byron pointed  
11 out that are identified in that chart in Exhibit 1, we made  
12 clear during pre-motion meet and confer discussions that we  
13 were not taking the position that purely business and  
14 operational documents were privileged, and we agreed to  
15 undertake a review of the documents identified in the motion,  
16 which we did.

17 We also explained to Plaintiffs that we were -- we would  
18 look for--and we referenced this in our opposition--similar  
19 documents, and we expanded our remediation or re-review to  
20 include any documents that included Mr. Heberer, in-house  
21 counsel.

22 We produced all of the documents subject to our  
23 remediation review identified in the exhibit Mr. Byron  
24 pointed to, save for those that had an issue with respect  
25 to no attorney being identified in the log, at the time of our

1 opposition, and made clear to opposing counsel that we were  
2 not taking the position that purely business and operational  
3 documents were privileged. And we finished the balance of our  
4 expanded re-review yesterday, as Mr. Byron represented.

5 Mr. Byron and I had a meet and confer, among other  
6 counsel, before this hearing for Your Honor. We were not  
7 shown any of these documents. We were not told what specific  
8 documents that they still have issues with. All of those  
9 documents that Mr. Byron went through were the first time  
10 we've heard that they still have issues with those.

11 I can speak to some specific background facts with regard  
12 to particular documents, but our position is to the extent the  
13 document remains withheld or redacted, it's because it  
14 implicates legal advice, either because it's reflecting legal  
15 advice, it's containing information for the provision of legal  
16 advice, or it's being commented upon by in-house counsel.

17 Outside of those categories, for the types of documents  
18 that fall into this business and operations category, Altice  
19 is not withholding any of these, and, frankly, Plaintiffs have  
20 hundreds if not thousands of documents that reflect the same  
21 facts as those that Mr. Byron represented Plaintiffs currently  
22 do not have.

23 THE COURT: What about the next category?

24 MR. ANDERSON: With respect to the sword/shield  
25 category, there is a -- respectfully, a fundamental

1 misunderstanding I believe on Plaintiffs' side with respect  
2 to what the law is and what the law requires.

3 At base, no court has ever held that a party's assertion  
4 of the DMCA safe harbor vitiates or waives its privilege with  
5 respect to communications regarding attorney/client  
6 communications regarding the development of the policy that is  
7 serving as the basis for that defense, and that would be an  
8 extraordinary finding given the fact that the safe harbor  
9 defense is a fundamental defense to cases of secondary  
10 copyright infringement.

11 Plaintiffs claim that Altice has put the 'why' at issue  
12 in this case, but the 'why', why it developed a policy is,  
13 frankly, irrelevant to the DMCA safe harbor. Mr. Byron  
14 referenced--I wrote it down here--reasonable steps. What's  
15 required under the -- and made reference to the sexual  
16 harassment cases and that particular defense of it that's at  
17 issue in this those cases. By what the DMCA requires is that  
18 an ISP, here Altice, adopted and reasonably implemented a  
19 policy that results in the termination of repeat infringers in  
20 appropriate circumstances. In other words, what's required is  
21 that there is a policy, that the ISP generally follows that  
22 policy--the way the courts have interpreted that 'reasonably',  
23 which modifies 'implement', is that it doesn't need to be  
24 perfect but it needs to follow it--and that the policy has to  
25 have a step at which termination is effectuated, and that when

1 that steps is reached it happens, generally. That's what's  
2 required.

3 Mr. Byron's comparison to cases relating to reasonable  
4 care, non-willfulness, whether you took diligent or had a  
5 -- you maintained your duty of care, those cases have no  
6 analogy to the copyright context. Of course there is -- there  
7 are situations in which, for example, if a party were  
8 asserting a legal opinion to refute willfulness and relying on  
9 that legal opinion, certainly any documents relating to the  
10 provision of that advice would be at issue, but that's not the  
11 case here.

12 The notion that Plaintiffs are being deprived of facts to  
13 test the 'why' is not supported by the record. Every single  
14 fact--and we could go through this point by point if the Court  
15 wanted to--is supported by documents in their possession, to  
16 the extent that there are any. What Altice is withholding on  
17 the basis of privilege and information that has not been put  
18 at issue in this case is the provision of legal advice in  
19 connection with, among other things, the development or the  
20 existence of its policy. For example, is this legal? Are we  
21 more -- are we exposed by doing this? Do we have liability if  
22 we do this? That is not at issue in this case. Plaintiffs  
23 know exactly why we -- the non-privileged business reasons why  
24 we deploy certain policies.

25 Mr. Byron focused on these lapses in gaps. They know

1 exactly why those happen. There are dozens of documents that  
2 describe them, and they've had 30(b)(6) testimony on it as  
3 well, all of which were met with no privilege objection.

4 Certain of the gaps happened because there were hardware or  
5 technology failures. Others happened because -- for example,  
6 there was one with respect to the -- during the early days of  
7 the COVID pandemic, the company decided to suspend certain  
8 actions, including its terminations and suspensions, along  
9 with, you know, non-payment, like many other utilities did.

10 They have all of these facts.

11 The -- and I guess the final point on the sword/shield is  
12 that the -- at base the 'why' behind the company's policies is  
13 not only not relevant to the DMCA safe harbor, it's not even  
14 relevant to the claims of secondary copyright infringement  
15 here. And then the notion that Altice has put this at issue  
16 is belied by Plaintiffs' own interrogatories which Mr. Byron  
17 referenced which ask Altice the reasons for certain of these  
18 things.

19 The provision of background facts and context regarding  
20 its policies does not put this information in and of itself at  
21 issue, and even if it were at issue, Plaintiffs have the full  
22 facts to test those, and all that they are being deprived of,  
23 if anything, are the hypothetical documents that would contain  
24 legal advice about certain of those elements; in other words,  
25 is this legal, what is the risk with respect to this. And

1 Your Honor, I'm not representing that there are even such  
2 documents.

3 THE COURT: Let me ask you this question, counsel.

4 But for the Court granting this motion and ordering or  
5 compelling additional production, has your side made its  
6 complete production in regard to these matters, so far as you  
7 know, or are you still in the process of generating and  
8 potentially producing additional material compliant with these  
9 requests? Give me some idea of where you are in a real-world  
10 sense here.

11 MR. ANDERSON: Certainly, Your Honor.

12 I'll note that--and Mr. Byron and I spoke a bit about  
13 this before the hearing today--there are documents that are on  
14 the chart that is Exhibit 1 to Plaintiffs' motion that I think  
15 were within the categories that Plaintiffs outlined as being  
16 outstanding that they have not yet had a chance to confirm or  
17 review yet because those documents were just produced  
18 yesterday. So it's not entirely clear whether there truly  
19 are as many issues as Plaintiffs believe that there may be,  
20 but perhaps Mr. Byron has more specific information.

21 But to answer Your Honor's question directly, we have  
22 finished our privilege remediation. All that remains, subject  
23 to any specific odd documents that Plaintiffs would wish to  
24 discuss on a document-by-document basis in the coming days, we  
25 have finished our privilege review remediation and all that

1       remains is serving a supplemental log, which we plan to do by  
2       Wednesday.

3                   THE COURT: All right. Do you have anything further  
4       for me on this?

5                   MR. ANDERSON: Just in terms of the substantiating  
6       privilege claims, as we said in our opposition, we did not  
7       take the position that any of the documents that are purely  
8       business or purely operational are privileged and, therefore,  
9       we were waiting or expecting and are prepared to engage in a  
10      process with Plaintiffs in which if there remain documents  
11      that they believe--not notwithstanding our remediation efforts  
12      and our representations and our supplemented logs--are not  
13      privileged or they wish to challenge those privileged claims,  
14      we will review those and stand ready to substantiate them  
15      consistent with local practice and Your Honor's rulings.

16                  And then the final point with respect to the privilege  
17      logs, we believe our logs were sufficient and consistent with  
18      the parties' agreements through letters back in August and  
19      September. They're very similar to the nature of descriptions  
20      that Plaintiffs have been providing in their logs as well.  
21      And aside from this motion, there was no complaint with  
22      respect to any of the descriptions until this motion. As we  
23      represented during meet and confer discussions and in our  
24      opposition, we're willing to supplement any descriptions that  
25      is necessary.

1                   THE COURT: So tell me again when you anticipate  
2 supplementing your log.

3                   MR. ANDERSON: Wednesday, Your Honor.

4                   THE COURT: Okay. All right. Anything further?

5                   MR. ANDERSON: Not unless Your Honor has any  
6 questions.

7                   THE COURT: No additional questions at this  
8 juncture.

9                   MR. ANDERSON: Thank you, sir.

10                  THE COURT: All right. I think in the interest of  
11 time, counsel, I'd like to move on to the opposed motion for  
12 protection from apex depositions filed by the Plaintiffs, and  
13 I'd like to hear from Plaintiffs on this motion to begin with.

14                  MR. ALLAN: Good afternoon, Your Honor. Thank you.  
15 Michael Allan for the Plaintiffs.

16                  THE COURT: Good afternoon.

17                  Please proceed.

18                  MR. ALLAN: Thank you.

19                  Your Honor, we've laid out the basis for this motion in  
20 our papers. There's a couple of additional points I'd like to  
21 make.

22                  The Defendants have noticed the depositions of Thomas  
23 Coesfeld, the chief executive officer of BMG, who resides in  
24 Germany, and Mr. Bob Valentine, who is the chief executive  
25 officer of Concord. Neither one of those executives has

1 specific information related to any of the issues in this  
2 case. They weren't disclosed in the interrogatory answers,  
3 they weren't disclosed in a initial disclosures, they're  
4 not -- it's not a scenario, Your Honor, where these CEOs  
5 signed an agreement that is in dispute or negotiated a  
6 particular provision where they've got percipient fact  
7 testimony. And this court and many courts in the Fifth  
8 Circuit have held that depositions of this sort are not  
9 appropriate to proceed unless there is a particularized  
10 firsthand knowledge.

11 In addition, there are plenty of other less exhaustive  
12 means that are available and have been available to Defendants  
13 for purposes of deposition. In fact, they claim that they  
14 have had no other testimony other than lawyers. That's not  
15 the case.

16 So to take Concord, for example, they've deposed Kent  
17 Hoskins, who is the chief financial officer for the entire  
18 company. He is probably the number three person in the  
19 organization; not a lawyer. And they deposed him at length on  
20 a number of financial related issues in the case.

21 They also deposed a gentleman by the name of Mr. Greg  
22 Goldman, who is an executive vice president of business and  
23 legal affairs. Yes, he is an attorney, but he also wears a  
24 business hat given his title.

25 And with respect to BMG, they deposed Keith Hauprich, who

1 is executive vice president business and legal affairs and a  
2 general counsel, but Mr. Hauprich also wears a legal  
3 hat--sorry; a business hat.

4 The Defendants have noticed 30(b) (6) topics, depositions  
5 with 60-plus topics covering a range of different scenarios,  
6 and they have had testimony from business people within the  
7 company and people that wear business hats within the company.

8 There is one piece of information that is not in our  
9 papers I'd like to point out, Your Honor.

10 THE COURT: What's that.

11 MR. ALLAN: With respect to other intrusive means, I  
12 went back to look at our various interrogatory responses, and  
13 in one of the very first interrogatory responses when we were  
14 negotiating or debating over venue and the propriety of venue  
15 in this court, Altice served an interrogatory on all of the  
16 Plaintiffs that said, "Please identify those particular"--and  
17 they defined these terms--"relevant Plaintiff representatives  
18 who have information as to relevant issues in the case." And  
19 they defined 'relevant issues' to mean Plaintiffs' ownership  
20 or possession of an exclusive right in the asserted  
21 copyrighted works, the amount of revenue that is earned from  
22 the exploitation of works, and the generation of financial  
23 information, Plaintiffs' copyright infringement enforcement  
24 efforts, lawsuits, notice sending programs and the like, and  
25 then, of course, collection of evidence. They wanted to know

1 where the relevant people would be for purposes of venue.

2       And in response to that, BMG identified Eric Scott, the  
3 executive vice president of rights and royalties; Brian Sub,  
4 the vice president business and legal affairs; Nils Eismann,  
5 senior vice president income tracking and royalty audit; Josh  
6 Mancuso, the VP of rights management; and Keith Hauprich, the  
7 GC and executive vice president of business legal affairs.

8       Concord identified Maureen Bacon, the director of  
9 business affairs and administration; Hazel Malit, the chief  
10 financial officer for the recorded music division; Ricky  
11 Hernandez, the vice president business and legal affairs; and  
12 Greg Goldman, a business and legal affairs executive vice  
13 president; and a gentleman named Mark Duckworth, who is  
14 responsible for IT -- the IT department.

15       Altice never noticed any of those folks for deposition  
16 other than the ones that they've taken--Mr. Hauprich and  
17 Mr. Goldman. And we designated Kent Hoskins, who's the  
18 overall company-wide CFO for Concord.

19       They clearly had less intrusive means to seek whatever  
20 discovery they tried to -- they're interested in seeking with  
21 respect to the apex depositions, the CEOs, of Mr. Coesfeld and  
22 Mr. Valentine. And they didn't take advantage of that, Your  
23 Honor.

24       And I think that, coupled with the fact that these folks  
25 don't have particularized knowledge of any of the issues in

1 this case beyond what has already been offered from testimony,  
2 requires that this motion be granted and those deposition  
3 notices be quashed.

4 THE COURT: All right. What's the response from  
5 Defendants?

6 MR. ELKIN: Good afternoon, Your Honor. Michael  
7 Elkin for the Defendants.

8 THE COURT: Good afternoon.

9 MR. ELKIN: May I proceed?

10 THE COURT: Please do.

11 MR. ELKIN: Thank you, Your Honor.

12 Mr. Allan just referenced the interrogatory answers to  
13 venue discovery, which was illuminating, but what we're  
14 governed by here are the Rule 26 disclosures that are made in  
15 connection with the merits. And if you take a look at the BMG  
16 Rights disclosures--and this is not the initial disclosure,  
17 it's not the amended disclosure; it's the second supplemental  
18 disclosure that was actually submitted on April 1, 2024--all  
19 you see there is Mr. Hauprich, the lawyer who's been the  
20 lawyer for the company for all of the years in question.

21 Then you have the Concord, not the initial, not the  
22 amended, but the second set of disclosures that's required  
23 again dated April 1, 2024, and other than the lawyer  
24 Mr. Goldman, what we have is Kent Hoskins, who was designated  
25 for four of the 61 topics specifically for the annual reviews.

1       The reason why we got to where we are, Your Honor, is  
2 that the Plaintiffs are litigating this case as if it were  
3 filed 10 years ago. If Your Honor takes a look at Docket 86,  
4 which is the Plaintiffs' amended complaint, which reads to a  
5 degree like a manifesto, paragraph 38, the first sentence  
6 really says it all. "Over the past two decades, as P2P piracy  
7 became widespread, record labels, music publishers, studios,  
8 and other copyright owners have sought to curb the massive  
9 infringement of their copyrighted works caused by online  
10 piracy through a variety of means, including litigation  
11 against both P2P sites and internet service providers."

12       What's happened, Your Honor, is the world has changed in  
13 the past 10 years. The landscape has changed. The music  
14 industry now has benefited from the proliferation of wide  
15 availability of broadband connections with these interactive  
16 streaming, coinciding with the complete dismantling of  
17 peer-to-peer piracy that they've -- that is -- permeates their  
18 first amended complaint.

19       We have asked for the depositions of the two people who  
20 we could identify, Mr. Coesfeld and Mr. Valentine, because  
21 those are the gentlemen who actually appeared in articles, who  
22 gave quotes on these very issues related to the coinciding of  
23 the dismantling of P2P piracy with the advent of interactive  
24 music.

25       I deposed all of the Plaintiffs in these cases -- in this

1 case, and, in particular, I wanted to find out who would know  
2 something about this particular subject. And I asked  
3 Mr. Goldman, who was the in-house lawyer who I deposed on the  
4 30(b) (6) for Concord, and this is what he said when I asked  
5 him a key question, which is -- this is the deposition that  
6 took place on February the 22nd, 2024, and this is on page 202  
7 of the transcript, lines 3 to 14. It's just one question and  
8 answer.

9 "And does Concord have any particular views about whether  
10 the availability of its music on the streaming platforms that  
11 we just identified had a positive effect on reducing piracy?"

12 And after Mr. Allan's objection, the witness responds, "I  
13 don't know the answer to that question."

14 Then I asked him a follow-up question: "Okay. Is there  
15 anyone within the company that would have a better idea?"

16 Answer: "I don't think so."

17 Your Honor, I would be -- these gentlemen -- we  
18 referenced articles and interviews in the record as part of  
19 the opposition to the motion. The burden, as the Court well  
20 knows, under Rule 26, once we demonstrate the relevance of the  
21 witnesses in question, the burden shifts to the Plaintiff to  
22 demonstrate--not us--but they have the burden to demonstrate  
23 whether there's a less obtrusive way for us to get the  
24 testimony.

25 I'm not standing hat on who the actual 30(b) (1) witnesses

1 are, but all we've had, other than a couple of -- one witness  
2 as to one aspect of some financial data for BMG was -- the  
3 lawyer even answered those questions. He was designated on  
4 all 61 topics. We would like to have a witness for each of  
5 these two Plaintiff groups who can testify as to what the  
6 business strategy is concerning dealing with P2P piracy given  
7 the fact that its business has changed. We could not get  
8 answers to that question either from Mr. Hauprich from BMG or  
9 Mr. Goldman from Concord. They have the burden to come up  
10 with someone else.

11 I had a meet and confer, I think two of them, with  
12 Mr. Allan on this subject, and we didn't get anyone that was  
13 offered up who could possibly substitute.

14 So yes, we are opposing this motion. We do think that we  
15 need factual testimony; someone that has knowledge who can  
16 speak to these business strategy issues.

17 THE COURT: All right. Anything further?

18 MR. ELKIN: No, Your Honor. Thank you for the  
19 argument.

20 THE COURT: All right. Well, let's move upon.

21 Based on what you've updated the Court on, there appears  
22 to be one subpart of Document 143, Defendants' motion to  
23 compel Wrights Corp, Inc., that seems to be live. I'd like to  
24 hear argument on this at this juncture.

25 So let me hear from the Defendants on this.

1 MR. PADMANABHAN: Thank you, Your Honor. Krishnan  
2 Padmanabhan.

3 And I have slides, but I don't have them printed out, so  
4 I'm going to go without slides, Your Honor, if that's okay.

5 THE COURT: I went to law school before there were  
6 slides. I understand that presentation format.

7 MR. PADMANABHAN: Thank you, Your Honor.

8 So what Altice is seeking here are -- is data,  
9 information, so documents regarding post-hoc attempts to  
10 verify Wrights Corp's--I'm sorry--to verify Wrights Corp's and  
11 Plaintiffs' -- let me start again.

12           What Defendants here are seeking are documents and data  
13 regarding Plaintiffs' and Wright Corp's attempt to do a  
14 post-hoc verification of the music files.

15 So what we know is that they have downloaded files that  
16 have the hash ID--okay?--which is a digital marker from the  
17 internet, after the claims period. So the claims period in  
18 this case ends in December 2022. After that they have  
19 downloaded files, and they are now trying to run them through  
20 an audio verification system. As we understand it, it's  
21 Audible Magic based on the fact they recently subpoenaed  
22 Audible Magic regarding the operation of their software today;  
23 not during the claims period, but today. And the output of  
24 that work will be something that says that the file they have  
25 downloaded either matches or does not match the database.

1       In their correspondence with us and in testimony given by  
2 one of Plaintiffs' witnesses, they have acknowledged that this  
3 work is being undertaken. The issue is they say that they  
4 want -- they don't want to provide the data output from their  
5 verification whether these files actually match the Audible  
6 Magic database or not because they say it's privileged--it's  
7 the work of their experts. But we're not seeking the opinions  
8 early; what we're seeking is the full output of that testing  
9 process.

10           THE COURT: Let me stop you with a question here at  
11 this juncture, counsel.

12           MR. PADMANABHAN: Yes, Your Honor.

13           THE COURT: Am I correct, from a procedural  
14 background there was a subpoena issued at your side's request,  
15 and it was originally filed through a court in one of the  
16 districts in California, which then kicked it back to this  
17 court. And there is currently a miscellaneous case in this  
18 court identified as Case No. 2:23-MC-09 assigned to Magistrate  
19 Judge Payne, which is, in effect, the resolution of that  
20 subpoena that was originally issued through the district in  
21 California.

22           Is there a procedural reason why this is before me  
23 instead of Judge Payne? I don't think there's a problem with  
24 me ruling on this, but it looks like procedurally it's teed up  
25 to be presented to him. Can you fill in the blanks here for

1 me?

2 MR. PADMANABHAN: Yes, Your Honor.

3 So the reality is it's not clear whether this data lies  
4 with Wrights Corp or with Plaintiffs, and we sort of did it as  
5 an amalgam motion in that sense. This was -- there was  
6 information coming from both the Plaintiffs' witness as well  
7 as a Wrights Corp witness that it was some sort of collective  
8 effort to perform this post-hoc verification. So I think it's  
9 styled a motion with respect to both Wrights Corp and  
10 Plaintiffs for that reason. And it's not clear who has the  
11 data. I'm sure Plaintiffs' counsel can speak to it. But we  
12 know the work's being done.

13 THE COURT: And what's the status or have there been  
14 representations from the Plaintiffs with regard to whether or  
15 not they would rely on this post-hoc material in their expert  
16 reports or use them as evidence at trial? Have there been  
17 concessions with regard to scope and use that I need to be  
18 brought up to speed on, or have there not been?

19 MR. PADMANABHAN: Your Honor, there have been -- the  
20 representation has been that it's the work of the experts.  
21 And we'll get the reports, and when we get the reports we'll  
22 see what they did or didn't do. Our fear, Your Honor, is that  
23 what we will get is an expert report saying, We put these  
24 hundred files into Audible Magic; they hit the database. That  
25 doesn't tell us about the files that didn't hit the database.

1       What we'd like is the underlying data showing what did and  
2       didn't; the totality of the underlying data, if you will.

3           Now, this same material has been found to not be work  
4       product in previous cases. Particularly, there was a district  
5       of Colorado case, DMCA case brought by the music companies  
6       against Charter, and this same post-hoc verification files  
7       were found to not be work product and were to be produced;  
8       again, the underlying data.

9           THE COURT: All right. What else do you have for me  
10      on this?

11           MR. PADMANABHAN: Your Honor, I think that's it,  
12      Your Honor. I think that the issue's pretty simple. If we  
13      get the data, we'll be happy.

14           THE COURT: Let me hear from the Plaintiff, please.

15           Thank you.

16           MR. CARACAPPA: Good afternoon, Your Honor. John  
17      Caracappa from the Steptoe firm.

18           THE COURT: Good afternoon.

19           MR. CARACAPPA: So I'll be brief, and I have a  
20      couple of points.

21           First, we do think this is in the wrong court. We do  
22      think it should be before Judge Payne, to the extent the  
23      Defendants are moving to compel information from Wrights Corp.  
24      You asked counsel why it wasn't before Judge Payne, and he  
25      said, Well, we don't know who has the information. They do

1 know who has the information. They know that Wrights Corp  
2 doesn't have it because that came out at a deposition. They  
3 asked Wrights Corp, Have you used Audible Magic to verify any  
4 audio files? Wrights Corp said no. They know that.

5 So now switching to the Plaintiffs, UMG, BMG, and  
6 Concord, they asked at least UMG and BMG, Have you used  
7 Audible Magic to verify any of the files? The answers for  
8 both parties was no. The only answer they have on the record  
9 was, It's possible my attorneys may be using Audible Magic or  
10 my attorneys may be working with our experts to use Audible  
11 Magic.

12 To the extent Steptoe is using Audible Magic, it has done  
13 so during the pendency of this case. That is the definition  
14 of work product material. To the extent Steptoe is working  
15 with its experts to use Audible Magic, they'll get that  
16 report, they'll see how, if at all, those experts are going to  
17 use Audible Magic, and then they can depose the experts at the  
18 time. And to the extent they are going to allege that we did  
19 something inappropriate or we withheld information or the  
20 experts withheld information, they can make that argument at  
21 the time.

22 We talked to them about this in the meet and confer. We  
23 said, We don't even know what you're asking the Court to  
24 compel because the record says Wrights Corp doesn't have the  
25 info and the clients don't have the info.

1                   THE COURT: If Wrights Corp doesn't have the info,  
2 and that's basically undisputed at this point, then the  
3 miscellaneous action for Judge Payne would seem to be a  
4 nullity.

5                   MR. CARACAPPA: That is correct, yes.

6                   THE COURT: So if it's a nullity, your statement  
7 "this ought to be before Judge Payne" doesn't seem to ring  
8 true.

9                   MR. CARACAPPA: Well, it seems like we should be  
10 making that argument in front of Judge Payne. They are  
11 alleging that it's with either Wrights Corp or the other named  
12 parties. We're explaining it's not with Wrights Corp and it's  
13 not with the other claimed parties.

14                  THE COURT: And the statement "IT'S not with Wrights  
15 Corp," is that coming from your clients or is that coming from  
16 Wrights Corp, or is that coming from somewhere else? Where's  
17 the source of that "it's not with Wright's Corp" coming from.

18                  MR. CARACAPPA: Sure, Your Honor.

19                  It's with the deposition of Greg Boswell. I believe they  
20 cite to it in their motion, but I have a cite here for the  
21 record. It's Greg Boswell at page 229.

22                  THE COURT: And tell me again who he is.

23                  MR. CARACAPPA: Sure. I'm sorry, Your Honor.

24                  Greg Boswell is the 30(b)(6) deponent for Wrights Corp.  
25 He was testifying on behalf of Wrights Corp.

1 THE COURT: Okay.

2 MR. CARACAPPA: They deposed him for seven hours,  
3 and they asked him about the code and they asked him about  
4 Audible Magic. And the question, "Has Wrights Corp been  
5 running any of the legal samples through Audible Magic?"

6 Answer: "Not in forever."

7                   Question: "When is the last time Wrights Corp used  
8                   Audible Magic?

9 "I'd have to look. Let me see if I can find it."

10 He goes on and later says, "Look, if you force me to give  
11 an answer it will be 2012, 2013."

12 And we explained that to the Defendants, and the  
13 Defendants said, Okay, well, if it's not with Wright's Corp,  
14 it must be with you, Steptoe.

15 And we said, What do you want? Do you want us? Do you  
16 think Steptoe lawyers to be deposed on this issue?

17 And they sort of hedged and didn't really say anything.

18 So again, Your Honor, in conclusion, we just don't think  
19 there's anything to compel. To the extent there are Audible  
20 Magic reports run by Steptoe, it's privilege. To the extent  
21 they're run by the experts, they'll get that information in  
22 the expert report and they can depose the expert at the time.

23 THE COURT: All right. Anything further?

24 MR. CARACAPPA: No, Your Honor. Thank you.

25 THE COURT: All right. Well, let's look at one

1 additional item which seems to be live and remaining, and that  
2 is a portion or a subpart of Defendants' motion to compel,  
3 Document 144. And this apparently has to do with the sixth  
4 subpoint of that motion with regard to agreements from four  
5 additional DSPs. And it may be three DSPs. Perhaps the issue  
6 with regard to YouTube is no longer live. But there appear to  
7 be issues live with regard to TIDAL, Deezer, and Qobuz. I'm  
8 not sure how to pronounce that.

9 Let me hear from the moving Defendants on this.

10 MR. ELKIN: Michael Elkin again, Your Honor.

11 May I proceed?

12 THE COURT: You may.

13 Is this still live with regard to YouTube or --

14 MR. ELKIN: No, it isn't. At the time the motion  
15 was filed, it was before the Harrison deposition, the  
16 representative from UMG as to whom we deposed. In connection  
17 with preparing for that deposition, we determined that even  
18 though we only asked for Google+, Google fortunately very  
19 nicely provided the YouTube agreement. We don't know that we  
20 had everything at the time, but Mr. Harrison was, in fact,  
21 deposed on that, so we withdrew --

22 THE COURT: That's fine.

23 MR. ELKIN: -- the request, Your Honor.

24 THE COURT: So the other three are live?

25 MR. ELKIN: Yes, Your Honor. And TIDAL is a

1 company, for what it's worth, based in New York, and the other  
2 two, Deezer and Qobuz, are large French companies that have  
3 worldwide streaming businesses, and each of these three are  
4 premium -- what I'll call premium streaming services, very  
5 prolific. Each of them have over a hundred million songs  
6 available on their platforms.

7 And I probably mentioned TIDAL when we argued this motion  
8 originally before Your Honor. We were here on December 21,  
9 2023, and at Docket 110 at page 2, your Honor ordered the  
10 Plaintiffs to in granting our -- part of our motion, to  
11 have --

12 THE COURT: As I recall, I gave you substantial  
13 relief at that point.

14 MR. ELKIN: Yes, you did, Your Honor, and we very  
15 much appreciate --

16 THE COURT: Part of what I'm concerned about now is  
17 the late hour at which this request comes to the Court.

18 MR. ELKIN: I appreciate that. And two things, if I  
19 may, and I will address that point.

20 First, we needed to be able to come back to the Court and  
21 represent, based on Your Honor's very careful admonition that,  
22 you know, this is a test case and you better find something  
23 that is worth it, and low and behold, after studying these  
24 various agreements and eventually having the deposition, it's  
25 clear that these agreements--and I won't get into any

1 individual name just to protect the confidentiality because I  
2 know that's a sensitive issue here--goes far beyond the  
3 per-song revenue numbers that dominated a lot of the argument  
4 that was before the Court on December the 21st. We're talking  
5 about minimum guarantees that are, in two cases, in the  
6 billions of dollars, and in the other agreements in the very  
7 significant hundreds of million of dollars that have nothing  
8 to do with per-work revenues. These are monies that are being  
9 made available to UMG just to have their repertoire available.  
10 There are per-stream content fees across various tiers of  
11 services. There are very lucrative advertising partnerships  
12 and credits worth many millions of dollars.

13 Our damages expert is busy working on this and  
14 incorporating that into their report. On the basis of that  
15 and Mr. -- the deposition that we took, we looked at all of  
16 the potential range of other digital service provider  
17 agreements, and we limited it to this set of three because  
18 it's a premium tier. These are premium tiers and would have  
19 financial aspects to it.

20 I wish we could have brought this earlier. Your Honor  
21 ordered these agreements to be produced on December 21st.  
22 They weren't produced until March in connection with Spotify.  
23 As Your Honor will recall from the protective -- the amended  
24 protective order, they required that their document--and we  
25 agreed to it, of course--would only be shown for a limited

1 period of time through a portal. We had to agree on this  
2 declaration in terms of what the terms are.

3 We were going to take Mr. Harrison's deposition earlier.  
4 They had some issues on the other side, which we understood.  
5 And so we came to the Court as quickly as we could in the  
6 circumstances. I wish this were January or February as well.  
7 It's not, but it is very important material, Your Honor, and  
8 we would urge the Court to consider the circumstances in need.

9 And the other thing I would just point out, I know the  
10 other side has made an issue in the past, and I understand it,  
11 and they'll -- I'm sure they'll saunter up to the lectern soon  
12 and regale you with all the problems they were put through in  
13 order to produce the other agreements.

14 There's already now a protective order in place; a  
15 protective order that satisfied the more significant companies  
16 like Apple and Amazon and Google. I would hope that, to a  
17 large extent the work, that has been done by the Court and the  
18 parties with regard to that protective order would help pave  
19 the way.

20 THE COURT: All right. What else?

21 MR. ELKIN: That's it, Your Honor.

22 THE COURT: Let me hear from the Plaintiff, please,  
23 in response.

24 MR. ELKIN: Thank you.

25 MR. ALLAN: Thank you, Your Honor. Michael Allan.

1 THE COURT: Please proceed.

2 MR. ALLAN: A couple of quick points.

3        This -- the Court's deadline for filing motions to compel  
4        in this case was March 25th, and literally at 9:00 p.m. on  
5        March 25th we had the final meet and confer to discuss various  
6        outstanding issues, and for the first time at 9:00, three  
7        hours before the deadline to file motions to compel in this  
8        case, opposing counsel said, Well, we want four more DSP  
9        agreements, knowing full well what we went through. And the  
10      Court I'm sure quite well remembers the difficulties we've  
11      had. And obviously we were not in a position to advise one  
12      way or the other whether we would be able to do that, and the  
13      motion was already drafted and ready to file. So it's not  
14      only late in terms of the discovery time; it's late -- the  
15      request came at the very, very end.

16 I'd also point out that these are four DSP agreements  
17 that they've asked for, they filed motions on. And I  
18 understand Mr. Elkin just said about YouTube, but he had  
19 -- Altice had that agreement in its hand, the YouTube-Google  
20 agreement which covered the YouTube materials for a month, and  
21 the only thing I can see is why they put it in a motion to  
22 seek to compel it is that they didn't even know that they had  
23 the YouTube agreement. And I question whether how important  
24 it is if they didn't even know they had it and filed a motion  
25 to compel on it.

1       The other three agreements, Your Honor, there was a  
2 30(b) (6) witness for UMG that testified. He was examined  
3 briefly about TIDAL, and I think there was testimony to the  
4 effect that TIDAL was effectively almost all a European  
5 entity, and that the revenue that company generated was all  
6 outside the U.S.

7       The two others now that they're seeking, Deezer and  
8 Qobuz--and one of us is probably getting it right, Your  
9 Honor--were not even mentioned at the deposition of  
10 Mr. Harrison, the 30(b) (6) witness at UMG on both of these  
11 issues. It wasn't even discussed. And I think, as I think I  
12 just heard Mr. Elkin testify, both of those entities are  
13 French entities.

14           THE COURT: He said European. I don't think he  
15 identified it further.

16           MR. ALAN: Maybe I got it wrong. Certainly outside  
17 the United States.

18           And I do have to say, although I did saunter up here,  
19 Your Honor, that it was a very, very difficult process to get  
20 this through. And, you know, as I went back and read the  
21 transcript earlier with respect to the DSP agreements, and  
22 Mr. Elkin stated back in December, "Plaintiffs have vastly  
23 overstated the hurdles that have to be traversed here." I  
24 don't think we did. I think we very adequately stated the  
25 hurdles, as the Court knows.

1           And yes, there are -- just even with the five DSPs that  
2       had been produced, there are two separate provisions, two  
3       separate orders because there couldn't even be agreement on  
4       that. These DSPs have no idea why they're relevant to this  
5       case. I still don't quite understand it, but we've tried to  
6       explain it to them. They don't want their materials put into  
7       the case. They certainly -- if it's in there, they want it  
8       all protected in their own certain way. It's going to take a  
9       significant amount of time to get these other three DSPs  
10      notified.

11           And I'll just leave you with one other point. I do think  
12      Mr. Elkin has overstated what these agreements say. Yes,  
13      there are minimum guarantees. During the discovery period all  
14      of them have been met. There are some advertising benefits  
15      that UMG gets out of it that's been referenced in the  
16      agreements, but the notion that there is some huge payout,  
17      that there's some balloon payment or some other amount of  
18      money that comes into these that's being redressed in these  
19      DPS agreements has not been borne out by the evidence.

20           So I think it's too late. It's going to be too difficult  
21      with these given the nature of the DSP agreements. I think  
22      the motion should be denied.

23           THE COURT: All right.

24           MR. ALLAN: Thank you, Your Honor.

25           THE COURT: Thank you.

1       Now, let me ask this. Are there other matters that were  
2 not resolved in the meet and confer and that have not been  
3 taken up by the Court with the presentation of argument today?  
4 Said another way, have I overlooked anything or between what  
5 you've already resolved through the meet and confer and these  
6 matters have we covered the waterfront?

7       What's each side's understanding?

8           MS. HENRY: I believe that's everything, Your Honor.

9           THE COURT: Plaintiff, what's your view?

10           MR. DAVIS: I believe that's correct, Your Honor.

11           THE COURT: Okay. Well, as I told you this morning  
12 when we met in chambers, your ability to resolve these  
13 disputes will be more palatable to you than me resolving them  
14 for you, but nonetheless, that's why I'm here. And with  
15 regard to these matters that we've heard argument on today,  
16 let me give you the Court's ruling.

17           With regard to the Plaintiffs' motion to compel material  
18 withheld on improper and unsupported or asserted  
19 privileges--or privilege, rather--brought by the Plaintiff,  
20 I'm going to deny that motion. I don't see a compelling  
21 basis to grant the relief requested.

22           With regard to the opposed motion for protection of the  
23 apex depositions brought by the Plaintiffs, I'm going to grant  
24 that motion. I think there have been more than adequate  
25 high-level persons made available, I think they've shown a

1 less intrusive means available, and, quite honestly, there is  
2 a sense the Court gets that this might be something of a  
3 fishing expedition. I do not find that there is a real  
4 prejudice to be visited upon the Defendants for not being able  
5 to depose these chief executives. I'm going to grant the  
6 motion for protection sought by the Plaintiffs.

7 With regard to the post-hoc verification issue in the  
8 Defendants' motion to compel Wrights Corp, Document 163, I'm  
9 going deny that motion. I just do not see a basis upon which  
10 to grant the relief sought.

11 And finally, with regard to the Defendants' motion to  
12 compel, Document 144--and this is what we just recently heard  
13 from counsel with regard to three remaining DSPs--I'm going to  
14 deny this motion. This is way late in the game. This is not  
15 the first go-round here. I understand this is a highly  
16 contested and complex issue, but we're well into this case and  
17 beyond many of the deadlines, and if I were to grant this, not  
18 only do I not see that these are absolutely necessary, but  
19 this is more or less guaranteed to blow up the schedule for  
20 the remaining portion of the trial, and I have no desire to do  
21 that. Given the late hour of this request and given what's  
22 already been produced, I do not see a compelling reason to  
23 grant that relief, and I'm going to deny that portion that  
24 remained live in Document 144.

25 All right. Those are the Court's rulings. I appreciate

1 the hard work that both sides have put in to narrow the issues  
2 as you have today.

3 Are there other issues that, while I have you before me,  
4 need any input.

5 MR. DAVIS: Yes, Your Honor.

6 May I be heard?

7 THE COURT: You may be.

8 MR. DAVIS: Thank you.

9 THE COURT: And I think I may have misspoken and  
10 said Document 163. I meant 143, just for the record.

11 What do you have, Mr. Davis?

12 MR. DAVIS: Your Honor, two somewhat housekeeping  
13 matters that I'd like to seek the Court's guidance on.

14 With respect to a number of the agreements that were  
15 reached today as a part of the meet and confer process, the  
16 parties having agreed to some additional discovery for which I  
17 believe we need to seek the Court's leave. Should we seek  
18 that in a separate motion outside of the proposed order that  
19 we're going to submit?

20 THE COURT: Let me ask this. Have you agreed on the  
21 scope of that additional discovery as a part of resolving what  
22 you have resolved?

23 MR. DAVIS: We have, Your Honor.

24 THE COURT: I would say, then, the most  
25 straightforward way is to submit as a part of your agreed

1 order for the Court's entry not only the resolution of the  
2 substantive issue but the ancillary provisions for additional  
3 discovery to address those that you've agreed on.

4 MR. DAVIS: Thank you, Your Honor. That answers  
5 that question.

6 THE COURT: Okay.

7 MR. DAVIS: The second and final point is with  
8 respect to the schedule again related to the agreements  
9 reached today and the additional discovery that will be  
10 undertaken over the next few weeks, the parties would like to  
11 reurge our request for an additional week to the schedule to  
12 serve opening expert reports and rebuttal expert reports. I  
13 know we previously filed a motion requesting two weeks and the  
14 Court denied that and granted a one-week extension again.  
15 We're reurging that, with the Court's permission. This time  
16 the motion is agreed or unopposed by the Defendants without  
17 any requirement for a change to the remainder of the deadlines  
18 in the schedule, including the trial date.

19 So I wanted to raise that for Your Honor. I understand  
20 we need to file a motion to amend the docket control order,  
21 but I just wanted to preview it for the Court and see if the  
22 Court had any guidance on that and for us before we do so.

23 THE COURT: Well, you're more intimately familiar  
24 with this than I am, at least as I sit here. You're correct  
25 if your reading of the tea leaves is that the rationale behind

1 the Court's partial grant of the earlier request was to avoid  
2 a ripple effect that would cause many of the other dates to  
3 then become jeopardized.

4 If your representation is that there's no opposition  
5 to that additional week and there is, more importantly, a  
6 representation that there would not need to be other  
7 adjustments in the schedule of the case because of it, I'll  
8 look at it favorably.

9 I want to be real clear to everybody. This case was  
10 originally scheduled, and I pretty much unilaterally  
11 significantly extended the scope of the timeline for this case  
12 given what was apparent to the Court on the front end of  
13 things as being not a simple case. But having done that and  
14 having materially extended the timeline early in the case, I  
15 am committed to keeping the trial date that we have and I'm  
16 committed to getting this case resolved on the remaining dates  
17 and deadlines that we have, so I'm going to be very stingy  
18 with any changes to any of these dates.

19 But if this one week extension is unopposed and if it is  
20 not going to open the door to further request to change other  
21 dates, then in all likelihood you'll see an order approving  
22 it, Mr. Davis, but I need to focus on that when I'm off the  
23 bench.

24 MR. DAVIS: I understand, Your Honor. Thank you for  
25 the guidance.

1 THE COURT: Do Defendants have anything of a similar  
2 nature related to housekeeping that needs to be raised?

3 MS. HENRY: No, Your Honor.

4 THE COURT: Again, counsel, thank you for a  
5 productive day. You are excused.

6 And the Court stands in recess.

(End of hearing.)

1 I HEREBY CERTIFY THAT THE FOREGOING IS A  
2 CORRECT TRANSCRIPT FROM THE RECORD OF  
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES  
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE  
6 COURT AND THE JUDICIAL CONFERENCE OF THE  
7 UNITED STATES.

8  
9 S/Shawn McRoberts

04/18/2024

10 \_\_\_\_\_ DATE \_\_\_\_\_  
11 SHAWN McROBERTS, RMR, CRR  
FEDERAL OFFICIAL COURT REPORTER

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25